

APPENDIX XVIII

ENDANGERED SPECIES ACT SECTION 7 – MOA

Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act

I. INTRODUCTION

- A. Parties. The Parties to this agreement are the U.S. Coast Guard (USCG), the U.S. Environmental Protection Agency (USEPA), the Department of the Interior (DOI) Office of Environmental Policy and Compliance, the U.S. Fish and Wildlife Service (USFWS), and the National Oceanic and Atmospheric Administration's (NOAA's) - National Marine Fisheries Service (NMFS) and National Ocean Service (NOS).
- B. The Parties have conducted a review of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and associated oil spill response activities to coordinate their actions under Section 1321(d) of the Clean Water Act and Section 7(a)(1) of the Endangered Species Act, as amended (16 U.S.C. 1531 et seq.) (ESA). Section 1321(d) of the Clean Water Act establishes the NCP and assigns responsibilities to Federal agencies in mitigating damage from oil and hazardous materials spills, including the conservation of fish and wildlife. Section 7(a)(1) of the ESA requires all Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior or Commerce, as appropriate, to review their programs and utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species. As a result of this review, recommended procedures have been developed that will achieve better conservation of listed species and critical habitat during implementation of oil spill response activities.
- C. This agreement provides a general framework for cooperation and participation among the Parties in the exercise of their oil spill planning and response responsibilities. Following the recommended procedures presented in this agreement will better provide for the conservation of listed species, improve the oil spill planning and response procedures delineated in the NCP, and ultimately streamline the process required by Section 7(a)(2) of the ESA.

II. PURPOSE

- A. This agreement is intended to be used at the area committee level primarily to identify and incorporate plans and procedures to protect listed species and designated critical habitat during spill planning and response activities. Proactive regional planning may also take into consideration concerns for proposed and candidate species, as well as listed species' habitat not yet designated as critical.¹

¹ Adverse effects on non-designated critical habitat used by listed species has a potential for having an adverse affect on these listed species. Therefore, planners should consider these areas if information is available. B. This agreement coordinates the consultation requirements specified in the ESA regulations,

50 CFR 402, with the pollution response responsibilities outlined in the NCP, 40 CFR 300. It addresses three areas of oil spill response activities: pre-spill planning activities, spill response event activities, and post-spill activities. The agreement identifies the roles and responsibilities of each agency under each activity. By working proactively before a spill to identify potential effects of oil spill response activities on listed species and critical habitat, and jointly developing response plans and countermeasures (response strategies) to minimize or avoid adverse effects, impacts to listed species and critical habitat should be reduced or avoided completely. Should a spill occur, response plans and countermeasures will be used to implement response actions to minimize damage from oil discharges in a manner that reduces or eliminates impacts to listed species and critical habitat. In the event that oil spill response actions may result in effects on listed species or critical habitat, the agreement provides guidance on how to conduct emergency consultation under the ESA. It also describes the steps for completing formal consultation, if necessary, after the case is closed, if listed species or critical habitat have been adversely affected.

- C. The goal of this agreement is to engage in informal consultation wherever possible during planning and response. With adequate planning and ongoing, active involvement by all participants, impacts to listed species and critical habitat and the resulting need to conduct subsequent ESA Section 7(a)(2) consultations will be minimized or obviated.

III. LEGAL AUTHORITIES

- A. The Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321., requires that when a spill occurs, the President take such action as necessary to ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial risk of a discharge of oil into the waters of the United States. The National Contingency Plan (NCP), 40 CFR Part 300, prepared in accordance with the FWPCA, assigns duties to Federal agencies to protect the public health and welfare, including fish, wildlife, natural resources and the public. The NCP designates the Federal On Scene Coordinator (FOSC) as the person responsible for coordinating an oil spill response. (The abbreviation OSC is used in the NCP, while the abbreviation for Federal On Scene Coordinator is FOSC in this agreement.) Nothing in this agreement limits the authority of the Federal On Scene Coordinator as defined in the NCP.
- B. The Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §1531 et seq., provides a means to protect threatened and endangered species and the ecosystems upon which they depend. The ESA requires that Federal agencies insure that the actions they authorize, fund, or carry out do not jeopardize listed species or adversely modify their designated critical habitat. Regulations for conducting Section 7 consultation are set forth in 50 CFR Part 402.

IV. DEFINITIONS

The following definitions apply to this agreement and are taken from the definitions contained in either the NCP or the March 1998 USFWS & NMFS Endangered Species Consultation Handbook. For definitions of terms not listed below, refer to the USFWS & NMFS Endangered Species Consultation Handbook and the NCP as appropriate. Area Committee - the entity appointed by the President consisting of members from qualified personnel of Federal, state, and local agencies with responsibilities that include preparing an area contingency plan for an area designated by the President. The chairs of the Area Committee are the USCG for coastal and Great Lakes plans, and the USEPA for inland plans. In some instances the Regional Response Team (RRT) may act as the Area Committee. In this MOA, the term Area Committee also includes the RRT acting as the Area Committee.

Area Contingency Plan (ACP) - the plan prepared by an Area Committee (or the RRT acting as the Area Committee) that is developed to be implemented in conjunction with the NCP and Regional Contingency Plan (RCP), in part to address removal of a worst case discharge and to mitigate or prevent a substantial threat of such a discharge from a vessel, offshore facility, or onshore facility operating in or near an area designated by the President. A detailed annex containing a Fish and Wildlife and Sensitive Environments Plan prepared in consultation with the USFWS, NOAA, and other interested natural resource management agencies should be incorporated into each ACP. In this MOA, the term ACP also includes sub-area ACP's, sub-area contingency plans, geographic response plans and geographic response strategies as per 40 CFR 300.210. Biological Assessment - information prepared by or under the direction of the Federal action agency (USCG or USEPA) regarding: 1) listed and proposed species and designated critical habitat that may be affected by proposed actions; and, (2) the evaluation of potential effects of the proposed actions on such species and habitat. Biological Opinion - document which includes: (1) the opinion of the USFWS or NMFS as to whether or not a Federal action is likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of designated critical habitat; (2) a summary of the information on which the opinion is based; and (3) a detailed discussion of the effects of the action on listed species or designated critical habitat. This document will also contain an incidental take statement, that, if appropriate, exempts the Federal actions from the ESA Section 9 take prohibitions. Candidate species – plant and animal taxa considered for possible addition to the List of Threatened and Endangered Species.

Case is Closed – When removal operations are complete in accordance with 40 CFR 300.320(b).

Critical habitat - areas designated by the USFWS and NMFS pursuant to Section 4 of the ESA for the purposes of identifying areas essential for the conservation of a threatened or endangered species and which may require special management considerations. Emergency Consultation – an expedited consultation process that takes place during an emergency (natural disaster or other calamity) (50 CFR 402.05). The Services have determined that oil spill response activities qualify as an emergency action. The consultation may be initiated informally. The emergency continues to exist until the removal operations are completed and the case is closed in accordance with 40 CFR 300.320(b). The FOSC will continue to conduct emergency consultations, if needed, until the emergency is over and the case is closed. Formal, or informal, consultation is initiated after the emergency is over, at which time the USFWS and/or NMFS evaluates the nature of the emergency actions, the justification for the expedited consultation, and any impacts to listed species and their habitats.

Federal On Scene Coordinator (FOSC) - the Federal official predesignated by USEPA or the USCG to coordinate and direct responses under the FWPCA as defined in the NCP. Formal Consultation² - a process between USFWS or NMFS and the Federal action agency (USCG or USEPA) that: (1) determines whether a proposed Federal action is likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat; (2) begins with a Federal agency's written request and submission of a complete Section 7 consultation

initiation package; and (3) concludes with the issuance of a biological opinion and incidental take statement, as appropriate, by either of the Services. If a proposed Federal action may affect a listed species or designated critical habitat, formal consultation is required (except when the Services concur, in writing, that a proposed action “is not likely to adversely affect” listed species or designated critical habitat. See informal consultation). Incidental Take - take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant.

Informal Consultation - an optional process that includes all discussions and correspondence between the USFWS or NMFS and the Federal agency (USCG or USEPA) or designated non-Federal representative, prior to formal consultation, to determine whether a proposed Federal action may affect listed species or critical habitat. This process allows the Federal agency to utilize the Services’ expertise to evaluate the agency’s assessment of potential effects or to suggest possible modifications to the proposed action, which could avoid potential adverse effects. If a proposed Federal action may affect a listed species or designated critical habitat, formal consultation is required (except when the Services concur, in writing, that a proposed action “is not likely to adversely affect” listed species or designated critical habitat).

2 Formal consultation can occur during planning or after the conclusion of emergency consultation if listed

species or critical habitat have been affected. Listed Species – for the purposes of this MOA, any species of fish, wildlife or plant,

which has been determined to be endangered or threatened under Section 4 of the ESA. National Contingency Plan (NCP) – National Oil and Hazardous Substances Pollution Contingency Plan. The NCP is a national plan that provides the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants and contaminants. The NCP is set forth in 40 CFR 300. National Response Team (NRT) - a national team, defined under the NCP, responsible for national planning, policy, and coordination for hazardous substance and oil spill preparedness and response, consisting of representatives from agencies named in 40 CFR 300.175(b).

Regional Response Team (RRT) - a regional team of agency representatives that acts in two modes: the standing RRT and incident specific RRT. The Co-chairs are the USCG and USEPA. The standing team is comprised of designated representatives from each participating Federal agency, state governments and local governments (as agreed upon by the states). Incident-specific teams are formed from the standing team when activated for a response. The role of the standing RRT includes establishing regional communications and procedures, planning, coordination, training, evaluation, preparedness and related matters on a region-wide basis. It also includes assisting Area Committees in coordinating these functions in areas within their specific regions. The role and composition of the incident-specific team is determined by the operational requirements of the response. During an incident, it is chaired by the agency providing the FOSC.

Services – Term used to refer to both the USFWS and NMFS.

V. PROCEDURES

Oil spill planning and response procedures are set forth in the NCP. This agreement is intended to facilitate compliance with the ESA without degrading the quality of the response conducted by the FOSC, to improve the oil spill planning and response process, and ensure continued inter-agency cooperation to protect, where possible, listed species and critical habitat.

A. PRE-SPILL PLANNING

- (1) While drafting Area Contingency Plans themselves may not result in effects to listed species, actions implemented under the plans may. It is essential that the Area Committee engage USFWS and NMFS during the ACP planning process while developing or modifying the ACP and response strategies. This informal consultation can be used to determine the presence of listed species or critical habitat, and the effects of countermeasures, and to ensure that measures to reduce or avoid impacts to listed species and critical habitats during oil spill response activities are developed. By consulting on the anticipated effects prior to implementing response actions, decisions can be made rapidly during the spill, harm from response actions can be minimized, and implementation of response strategies specifically designed to protect listed species and critical habitat can be achieved.
- (2) The pre-spill planning process is shown as a flow chart in Appendix A. The Area Committee Chair will request, in writing, that endangered species expertise and a species list be provided by the Services.³ The request should also describe the area and include a general description of the countermeasures being considered and the planning process to be used (e.g., a workgroup). In order to document the request for consultation and planning involvement, the request shall be sent to both NOAA and USFWS. To obtain NMFS assistance, a request should be sent to the Department of Commerce (DOC) RRT representative, with a copy to the NOAA Scientific Support Coordinator (SSC) and the NMFS Regional Field Office. For USFWS support, a request should be sent to the local USFWS field office(s), with a copy to the USFWS Regional Response Coordinator (RRC) at the appropriate USFWS Regional Office(s) and the DOI RRT representative. It is the responsibility of the USFWS RRC, acting through the Ecological Services Assistant Regional Director, and the NOAA SSC to act as a liaison between the respective Service and the Area Committee. USFWS and NMFS will orally respond to the request within 30 days of receipt and provide a written response within 60 days. The response should include designation of a listed species expert to assist the Area Committee.
- (3) If listed species or critical habitat are present in the planning area being considered the Area Committee should use a planning process that ensures engagement of Service experts.⁴ This process shall ensure that the appropriate participants jointly gather and analyze the information needed to complete the Planning Template in Appendix C. This planning process constitutes informal consultation.⁵ The goals of this planning process are to identify the potential for oil spill response activities to adversely affect listed species and critical

habitat and to identify for inclusion in the ACP information on sensitive areas, emergency response notification contacts, and any other information needed. Methods should be developed to minimize identified adverse effects and, where necessary, the plan should be modified accordingly. If specific sources of potential adverse effects are identified and removed, the Services will provide a concurrence letter and Section 7(a)(2) requirements will be deemed to have been met.⁶

- (4) If, after the process in Appendix C has been followed, it cannot be determined that adverse effects will not occur during a response action, the USCG or USEPA, as appropriate, will initiate formal consultation using the information gathered in Appendix C; this information will be used by the Services to complete formal 340 CFR 300.170(a).

4 Process options include using an informal workgroup; formal workgroup, Environmental Risk Assessment process, or other process based on Area Committee needs. 5 This process does not negate any regional consultations that have already occurred, nor alter the strategies/procedures in the ACP until the ACP is officially modified in consultation with USFWS or NMFS.

6 Letter is required for the administrative record. See Appendix E. consultation.⁷ This will be a programmatic consultation that generally addresses oil

spill response activities at issue in the plan area. At times when specific information is available about certain oil spill response methods and listed species and critical habitat, it may be possible to pre-approve particular activities that may be implemented in the event there is insufficient time to initiate emergency consultation before the need to take action. 8

- (5) All parties recognize that development and modification of the ACP is an ongoing process. Changes, including modifications to response actions or changes to the species list, should be addressed regularly through a dynamic planning process. The Services should contact the Area Committee or workgroup if they become aware of newly listed species that may be affected by planned response activities. The Area Committee should likewise notify the Services of changes to planned response activities. The Area Committee or workgroup should evaluate any changes and assess the need for additional consultation as needed.

B. OIL SPILL RESPONSE

During an oil spill event which may affect listed species and/or critical habitat, emergency consultations under the ESA are implemented (50 CFR 402.05) for oil spill response actions.⁹ Emergency consultation may be conducted informally through the procedures that follow (See Appendix A). Emergency consultation procedures allow the FOSC to incorporate listed species concerns into response actions during an emergency. "Response" is defined in this agreement as the actions taken by the FOSC in accordance with the NCP. The FOSC conducts response operations in accordance with the NCP and agreement established in the ACP.

- (1) As per the NCP and ACP, the FOSC will notify the RRT representatives of DOI and DOC through the established notification process regardless of whether listed species or critical habitat is present. Upon notification, the DOC and DOI representatives shall contact the NOAA SSC and RRC, respectively, and other

appropriate Service contacts as provided in internal DOC or DOI plans, guidance, or other documents. If established in the ACP, the FOSC may also contact the Service regional or field offices directly (see Section V(A)(3) above). If listed species and/or critical habitat are present or could be present, the FOSC shall initiate emergency consultation by contacting the Services. The NOAA SSC and RRC shall coordinate appropriate listed species expertise. This may require timely on-scene expertise from the Services' local field offices. These Service representatives may, as appropriate, be asked by the FOSC to participate within the FOSC's Incident Command System and provide information to the FOSC.¹⁰ 7 Letter is required for the administrative record. See Appendix E.

8 Due to time constraints associated with spill response, this does not mean that immediate spill response

actions cannot occur to meet the requirements of 40 CFR 300.317. However, planning should address

specific procedures for initiating emergency consultation for activities that are pre-approved and for those

that have not been pre-approved.

9 Based on pre-spill planning or discovered during the response.

10 40 CFR 300.175(b)(7) & (b)(9); 40 CFR 300.305(e). (2) The ACP, including any agreed upon references cited in the ACP, should form the

basis for immediate information on response actions. As part of emergency consultation, the Services shall provide the FOSC with any timely recommendations to avoid and/or minimize impacts to listed species and critical habitat.¹¹ The NOAA SSC should also be involved in these communications as appropriate. If incidental take is anticipated, and if no means of reducing or avoiding this take are apparent, the FOSC should also be advised and the incidental take documented. If available, the FOSC should consider this information in conjunction with the national response priorities established in the NCP.¹² The FOSC makes the final determination of appropriate actions.

- (3) It is the responsibility of both the FOSC and the Services' listed species representatives to maintain a record of written and oral communications during the oil spill response. The checklist contained in Appendix B is information required to initiate a formal consultation in those instances where listed species and/or critical habitat have been adversely affected by response actions.¹³ If it is anticipated that listed species and/or critical habitat may be affected, the FOSC may request that the USFWS and/or NMFS representative to the Incident Command System oversee and be responsible for the gathering of the required information in Appendix B while the response is still ongoing.¹⁴ The FOSC may also choose to designate another individual to be responsible for collecting the information.¹⁵ Although in some instances the drafting of information for Appendix B may be completed after field removal operations have ceased, it is anticipated that collection of the information should be complete before the case is officially closed and that no further studies will be necessary.

- (4) It is the responsibility of the FOSC to notify the Services' representatives in the Incident Command System of changes in response operations due to weather, extended operations, or some other circumstance. It is the responsibility of the Services to notify the FOSC of seasonal variances (e.g., bird migration), or other natural occurrences affecting the resource. If there is no Service representative in the Incident Command System, the FOSC will ensure that the NOAA SSC and/or DOI representative to the RRT remains apprised of the situation. The Services will continue to offer recommendations, taking into account any changes, to avoid jeopardizing the continued existence of listed species or adversely modifying critical habitat, and to minimize the take of listed species associated with spill response activities.

11 See Section 8.1 of the USFWS & NMFS Endangered Species Consultation Handbook (<http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm>). 12 40 CFR 300.317 National Response Priorities.

13 See Section 8.2(B) of the USFWS & NMFS Endangered Species Consultation Handbook. 14 If requested by the FOSC, the NOAA Scientific Support Coordinator (SSC) may coordinate this data collection.

15 See Appendix D for example Pollution Removal Funding Authorization (PRFA) Statement of Work language. C. POST RESPONSE If listed species or critical habitat have been adversely affected by oil spill response activities, a formal consultation is required, as appropriate. 16 Informal emergency consultation shall remain active until the case is closed. The FOSC will initiate consultation on the effect of oil spill response activities (not the spill itself) after the case is closed. Every effort shall be made to ensure that relevant information generated as part of the consultation process is made available for use in the Natural Resource Damage Assessment (NRDA) process. (Note: NRDA activities are separate from this consultation.)

- (1) After the FOSC determines that removal operations are complete in accordance with 40 CFR 300.320(b), the impacts of the response activities on listed species and critical habitat will be jointly evaluated by the FOSC and the Services.
- (2) If listed species or critical habitat were adversely affected by oil spill response activities, the FOSC will follow the procedural requirements of 50 CFR 402.05(b) (see Appendix A). The document developed by following Appendix B, information required to initiate a formal consultation following an emergency, should be included with a cover letter to the Services requesting consultation and signed by the FOSC. The FOSC will work with the Services and the NOAA SSC, as appropriate, to ensure that Appendix B is complete. 17 This document comprises the FOSC's formal request for consultation.
- (3) The Services normally issue a biological opinion within 135 days of receipt of the Section 7 consultation request (50 CFR 402.14). When a longer period is necessary, and all agencies agree, the consultation period may be extended. The final biological opinion will be prepared by the Services and provided to the FOSC, USFWS RRC, NOAA SSC, DOI and DOC RRT members, and the Area Committee Chair so that recommendations can be reviewed by the Area Committee, and where appropriate, implemented to minimize and/or avoid effects

to listed species and critical habitat from future oil spill response actions.¹⁸ The result of the consultation should be considered by the FOSC for inclusion in a lessons learned system so changes can be made to the ACP, as necessary, for the benefit of future oil spill response actions. If such changes to the ACP modify the anticipated effects to listed species or critical habitat, the Services should appropriately document the anticipated changes in future effects and complete any appropriate administrative steps.

16 If only proposed species or proposed critical habitat have been adversely affected, a formal consultation

is not required; however, ESA conference procedures should be followed as appropriate. See the USFWS & NMFS Endangered Species Consultation Handbook for conference information. 17 The NOAA SSC may also assist.

18 Recommendations may also be provided for addressing effects caused by spill response actions. This information should be provided to the NRDA process as appropriate. VI. Points of Contact. The following are the points of contact for each Party:

USCG: Chief, Office of Response, Coast Guard Headquarters (G-MOR), (202) 267- 0516.

USEPA: Oil Program Center, U.S. Environmental Protection Agency, (703) 603-8823. NOAA - NMFS: Section 7 Coordinator, Endangered Species Division, Office of Protected Resources, (301) 713-1401.

USFWS: National Spill Response Coordinator, U.S. Fish and Wildlife Service, Division of Environmental Quality, (703) 358-2148.

NOAA - NOS: Director, Office of Response and Restoration, (301) 713-2989 x101.

DOI: Office of Environmental Policy and Compliance, (202) 208-6304.

VII. Funding and Resources. This agreement is not a fiscal or funds obligation document.

Nothing in this agreement shall be construed as obligating any of the Parties to the expenditure of funds in excess of appropriations authorized by law or otherwise commit any of the Parties to actions for which it lacks statutory authority. It is understood that the level of resources to be expended under this agreement will be consistent with the level of resources available to the Parties to support such efforts. Any activities involving reimbursement or contribution of funds between the Parties to this agreement will be handled in accordance with applicable laws, regulations and procedures. Such activities will be documented in separate agreements with specific projects between the Parties spelled out. The separate agreements will reference this general agreement.

VIII. Effective Date. The terms of this agreement are effective upon signature by all Parties.

IX. Modification. This agreement may be modified upon the mutual written consent of the Parties.

X. Termination. The terms of this agreement, as modified, with the consent of all Parties, will remain in effect until terminated. Any Party upon 60 days written notice to the other Parties may terminate their involvement in this agreement.

Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act

APPENDIX B

EMERGENCY CONSULTATION

INFORMATION CHECKLIST IN ANTICIPATION OF FOLLOW-UP FORMAL CONSULTATION (50 CFR 402.05)

As soon as practicable after the emergency is under control, which occurs when the case is closed, the FOSC initiates consultation (either formal or informal, as appropriate) with the Services if listed species and/or critical habitat have been affected. The FOSC should ensure that the following checklist is completed before the case is closed. After the case is closed, this information along with a cover letter

requesting consultation will be sent to the Services.

1. Provide a description of the emergency (the oil spill response).
2. Provide an evaluation of the emergency response actions and their impacts on listed species and their habitats, including documentation of how the Services' recommendations were implemented, and the results of implementation in minimizing take.
3. Provide a comparison of the emergency response actions as described in #2 above with the pre-planned countermeasures and information in the ACP.

APPENDIX C

PLANNING TEMPLATE

One of the goals of the Area Contingency Plan (ACP) planning process is to develop strategies or actions that reduce the potential for planned oil spill response activities to adversely affect listed species and designated critical habitat. The planning process may also develop strategies that purposefully protect these resources. The following template is recommended for use by a working group of both Service and Area Committee representatives to develop a document that 1) is used to complete consultation pursuant to Section 7 (a)(2) of the Endangered Species Act of 1973, as amended, and 2) produces information to be included in the appropriate sections of the ACP. To streamline the consultation process, the various sections of this document could be drafted during the planning process and used to develop or modify the ACP.¹⁹ This development process will assist all parties in gaining a thorough understanding of the actions under review and provide opportunities for any Section 7 consultation related issues to be raised and addressed in the planning process, rather than during the oil spill response action. This template is intended to guide the thought process of creating consultation documents and incorporates content requirements set forth in 50 CFR 402.12 as well as information pertinent to the National Contingency Plan requirements under the Fish and Wildlife Annex; not every item will be applicable to every situation.²⁰ Introduction This section generally should be completed in one, or possibly two paragraphs.

General overview of the response strategy including: (1) a brief description - one to two sentences; (2) background, history, etc. as appropriate; (3) purpose of the response strategy; (4) identification of the species and designated critical habitat that may be affected (for consultations that will address large numbers of species, it may be desirable to present this list in the form of a table either attached or presented in another section. Also, if species that may potentially occur in the area are not included in this document, explain why).

This should be developed jointly by the action agency and the Services.

Description of the Proposed Response Strategy

Provide a description of the response strategy being considered. This is likely to be a detailed description taken substantially from the ACP. It should include how the

19 It is not required that this planning template be formally written or completed during informal

consultation, especially if no modifications to the strategy are required. However, it can be very useful in documenting the [team's] thought process for the administrative record, serving as a guide, or providing additional documentation as needed.

20 The guide on "Developing Consensus Ecological Risk Assessments" provides procedures which may be helpful in exploring and analyzing these issues. Copies can be obtained from USCG Headquarters (GMOR-2). response action will be implemented, including equipment and methods. Examples include use of dispersants to avoid shoreline impacts, and deployment of booms to protect sensitive areas. Include all known aspects of the action, such as time frames, why the action is appropriate, indirect effects, etc. An example of an indirect effect may be hauling boom on, or driving vehicles through, a sensitive dune area to gain access to a spill site.

This should be developed by the action agency with the assistance of the Services. Provide a description of specific area that may be affected by the response strategy (i.e. Sample Bay, 100-mile section of outer coastline, etc.). Include some measure of the area potentially impacted (i.e., "This plan addresses oil spill response activities that may be conducted out two miles from the coast throughout the 100 mile coastline area encompassed by this ACP"). If different activities are being proposed in different areas, identify this. The team should discuss the appropriateness of presenting this information in terms

of the activities that will be conducted within each area, or the areas where each activity will be conducted. For example, "Dispersants may be applied throughout the 10 mile coastline length of Area A and the 25 mile coastline length of Area B." Maps may be useful. This should be developed mainly by the action agency; however, modifications may be made with the assistance of the Services and subject to the approval process for chemical countermeasures in the NCP as appropriate.

Identify how to quickly obtain species/habitat information during a spill (i.e. first refer to ACP and site summary sheet, call State FWS, check website, etc.). This should be developed jointly by the action agency and the Services. Identify emergency response points of contact to be notified during a spill. Establish spill parameters for notification as necessary. These should be included in emergency notification numbers as well as on any site summary sheets, in geographic response plans, etc. This should be developed jointly by the action agency and the Services.

Description of the Affected Environment

Describe the listed species and designated critical habitat areas that may be affected by the action in terms of overall range and population status. Include the number and location of known subpopulations within and adjacent to the action area (i.e., identify the areas known to be used by the species and, if appropriate, identify the specific times periods of use, such as February - April). Discuss the action area in relation to the distribution of the entire population (e.g., edge of the range, center of population abundance, key reproductive area, etc.). Present views of Service recognized experts on the species, if appropriate.

This should be provided by the Services.

Ensure that these sensitive areas are referenced in the ACP (i.e. via ESI maps, specially generated GIS maps, site summary sheets, or other digitized format, etc.). This should be completed by the action agency.

Provide biological data on listed species: historical use, presence, and potential use of habitat areas within the action area. Literature and other documents containing such information may be incorporated by reference. Provide species observation information, and recent results of species surveys, including, if appropriate, a description of methods, time of year surveys were performed, level of effort, and confidence intervals. Again, literature and other documents containing such information may be incorporated by reference. Maps may be useful to depict this information.

The Services should assist in developing this information. In many instances the Services will be able to supply this information from their records. Identify other designated sensitive areas, both adjacent to and within the proposed action area. These include National Wildlife Refuges, National Marine Sanctuaries, etc.

This should be developed jointly by the action agency and the Services.

Analysis of the Effects of the Action

Describe all effects of the response strategy relative to the listed species of concern and its habitat, including designated critical habitat. This should include direct, indirect, beneficial, and cumulative effects as well as effects from interrelated and interdependent actions, if any.

This should be developed jointly by the action agency and the Services. Describe any measures that may avoid or lessen adverse effects as well as any measures that will enhance the species' present condition. If appropriate, delineate the locations of such measures. A discussion of environmental "tradeoffs" (including no action) may be appropriate. For example, "Dispersants may be toxic to the listed aquatic species when used in concentrations above 70%; however, oil coming ashore and smothering the listed species in tidal marshes is of greater concern due to the extremely poor conservation status of this species." Reference any already completed relevant reports, studies, biological assessments, etc.

This should be developed jointly by the action agency and the Services.

Modification to Strategy (as needed)

If necessary, after joint analysis of the information, the action or strategy may be modified.

Describe the new strategy or action. For example, "Dispersants will not be used in concentrations above X% or in areas less than three feet deep. They may be used in Area A and Area B. A Service representative from Regional field office B will be contacted during an oil

spill response during the months of February - April in Area B.”

This should be developed jointly by the action agency and the Services.

Documentation

This template is a guide to help you through the planning process, however, when sections are written out as the process is completed, the final document serves the same purpose as a biological assessment. It may be used to complete consultation pursuant to Section 7 of the ESA.

The document should be maintained on file by the Services and may be referred to during an oil spill response.

The Area Committee will ensure that this document becomes part of the ACP as appropriate such as:
Included as an appendix to the Dispersant or In Situ Burn Operations Plan;

Included as a reference document in the appropriate section of the ACP;

Include relevant information in sections of the ACP such as Notifications, Site Summary Sheets, Geographic Response Plans, GIS maps, etc.

The document should include points of contact from both the action agency and the Services.

APPENDIX D

SAMPLE POLLUTION REMOVAL FUND AUTHORIZATION (PRFA)

LANGUAGE*

This Statement of Work (SOW) language is intended as sample language only. The language can be tailored to ensure that the FOSC is provided with the resources needed to meet the desired activities or functions required. Accordingly, more precise or succinct language may be used.

PRFA SOW additional/optional work elements to meet the FOSC’s ESA mandated activities associated with removal actions:

....

To arrange for, and as appropriate coordinate with, the resources needed to meet the conference and consultation requirements of the ESA.

Specific activities anticipated under this requirement include:

- (a) Providing the expertise needed to make sensitive removal decisions which could potentially impact on listed species or critical habitats associated with this incident;
- (b) Gathering and documenting the information needed to provide input into the aforementioned decisions and to document the resulting impact of removal actions; and
- (c) As required, preparing the consultations required of the FOSC for the Service(s).

Funding under this agreement is provided for:

- (a) Salaries, travel and per diem;
- (b) Appropriate charges for use of equipment or facilities;
- (c) Any actual expenses for goods and/or services reasonably obtained in order to provide the agreed upon support to the FOSC removal activities (including contracts.)

*

Developed by the National Pollution Funds Center

APPENDIX E

SAMPLE LETTERS FOR REQUESTING CONCURRENCE OR FORMAL CONSULTATION

These sample letters have been developed to assist the Parties to this agreement in documenting the requirements of the Endangered Species Act. This is suggested wording only and may be used to complete the administrative record as needed. The request for concurrence can be used after the planning process for a particular area or countermeasure when it has been determined that no adverse effects will occur. The Services will provide a concurrence letter, as appropriate, for documentation. Alternatively, the request for formal consultation can be used after planning results indicate that adverse effects may still occur. If this is the case, the Services will evaluate the information developed jointly by the workgroup and issue a biological opinion.

Request for Concurrence Letter:

Mr./Ms. xxx

U.S. Fish and Wildlife Service/National Marine Fisheries Service
Division of Endangered Species

Dear Mr./Ms. xxx:

In accordance with the requirements of Section 7 of the Endangered Species Act, I am seeking your concurrence that the [Coast Guard's/EPA's] implementation of the [name of plan] is not likely to adversely affect the [identify the listed species and designated critical habitat that may be affected. Note, in cases where many listed species or critical habitat designations may be involved, it may be appropriate to refer to an attached list].

This [name of plan] has been developed with the assistance of [name of Service staff] of the U.S. Fish and Wildlife Service/National Marine Fisheries Service and in accordance with the procedures identified at 40 CFR Part 300, the National Contingency Plan. To assist in completing informal consultation, please find attached the Biological Evaluation that has been produced through the planning process described in the Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act using the Planning Template contained in Appendix C of that Agreement.

Thank you for your efforts in this matter. If you require additional information, please contact [provide a contact with a telephone number].

Sincerely,

Request for formal consultation:

Mr./Ms. xxx:

U.S. Fish and Wildlife Service/National Marine Fisheries Service Division of Endangered Species Dear Mr./Ms. xxx:

In accordance with the requirements of Section 7 of the Endangered Species Act, I am requesting the initiation of Formal Consultation on the effects of the [Coast Guard's/EPA's] implementation of the [name of plan]. Through informal consultation with your staff [or identify the appropriate Service office(s)], we have determined that implementation of spill response activities in accordance with the subject [name of plan] is likely to result in adverse effects to [identify the listed species and designated critical habitat that may be affected. Note, in cases where many listed species or critical habitat designations may be involved, it may be appropriate to refer to an attached list]. This [name of plan] has been developed with the assistance of [name of Service staff] of the U.S. Fish and Wildlife Service/National Marine Fisheries Service and in accordance with the procedures identified at 40 CFR Part 300, the National Contingency Plan. While these actions may result in short-term adverse effects, it is our belief that the species [and designated critical habitat areas] will ultimately benefit from them. To assist in completing Formal Consultation, please find attached the Biological Evaluation that has been produced through the planning process described in the Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act using the Planning Template contained in Appendix C of that Agreement.

Thank you for your efforts in this matter. If you require additional information, please contact [provide a contact with a telephone number].

Sincerely,

APPENDIX XV

A: FREQUENTLY ASKED QUESTIONS MOA FOR SPILL PLANNING & RESPONSE UNDER THE FEDERAL WATER POLLUTION CONTROL ACT'S (FWPCA) NATIONAL CONTINGENCY PLAN (NCP) & ENDANGERED SPECIES ACT (ESA)

The ESA requires that Federal agencies ensure that the actions they authorize, fund, or carry out are not likely to jeopardize listed species or destroy or adversely modify their designated critical habitat. Response to an oil spill is an emergency; however, this does not relieve the responding federal agencies of their responsibilities under the ESA. During emergencies, this responsibility can be fulfilled by the responding agency relatively quickly through informal consultation, with formal consultation being completed if needed after the emergency response is complete and the case is closed. The National Contingency Plan (NCP) provides that Area Committees and Federal On Scene Coordinator's (FOSC's) consult with the Services during planning for sensitive areas (40 CFR 300.210©(4)(i)), and during response (40 CFR 300.305(e)). The MOA provides guidance for implementing these provisions as well as the emergency consultation provisions in the Interagency regulations implementing Section 7 of the ESA (50 CFR 402.05).

The MOA provides a general framework and guidance for cooperation and participation among the ESA consultation agencies (USFWS and NMFS) and other agencies (USCG and EPA) in oil spill planning and response. The agreement integrates the provisions for consultation under the ESA with the requirements of the NCP which describes the relationship between the FOSC and natural resource trustees (DOI and DOC) (NCP Sections 300.170 & 300.175) and calls for coordination with USFWS and NOAA on sensitive environment plans that are incorporated in the ACP (40 CFR 300.305(e)).

The MOA will assist the response agencies in meeting their statutory responsibilities under Sections 7(a)(2) and 7(a)(1) of the ESA. Section 7(a)(2) sets out the consultation process with the Services. Section 7(a)(1) of the ESA requires each federal agency to utilize its existing authorities to further the purposes of the Act by carrying out programs for the conservation of listed species. Following the recommended procedures in the MOA will provide for the conservation of listed species, improve oil spill planning & response, and streamline the required consultation process. In addition, the MOA provides the Services with direct involvement in oil spill planning and response.

Nothing in this agreement limits the authority of the FOSC as defined in the NCP. FWPCA Section 311©(3) requires that federal agencies conducting removals under Section 311© act in accordance with the NCP or as directed by the President. The NCP designates the FOSC as the person responsible for coordinating an oil spill response. The FOSC makes the final determination of appropriate oil spill response actions to minimize or mitigate damage to the public health, safety, and the environment and decides whether to delay or stop an emergency response.

Section 300.317 of the NCP sets forth the national response priorities with "safety of human life" being the top priority during every response. The national response priorities also specifically cover actions for stabilization of the situation and actions to minimize adverse impacts to the environment. However, Section 300.317(e) also makes it clear that the listed priorities are broad and should not be interpreted to preclude the consideration of other priorities that may arise on a site-specific basis, such as the protection of listed species and critical habitat from the potential effects of an oil spill removal action. With adequate planning and ongoing, active involvement by all participants, the FOSC will be provided with information to help reduce or avoid the impacts of spill response on listed species and critical habitat. Planning is an ongoing process, a fact that is recognized in the requirement for Area Contingency Plans (ACPs) to be reviewed and updated every few years. The goal of the MOA is for the Area Committee/Regional Response Team (RRT) to use a process that helps them develop and improve sections of the ACP that relate to listed species and critical habitat. Some important items to include in the ACP relevant to ESA are: who should be notified when a spill occurs, when/under what conditions they should be notified, where the Service representatives would work in the Incident Command System (ICS) established for a spill, and information on listed species and critical habitat. Much of this information is required in the "fish and wildlife annex," described in 40 CFR 300.210©(4)(ii) and can be

obtained by from Service representatives participating in the area planning process. Text Box: Does the MOA affect FOSC authority to determine response actions?Text Box: Must ACP's be "redone?"

These are two separate processes authorized under different laws. While some of the information generated as part of post-spill consultation may be useful in Natural Resource Damage Assessment (NRDA), one process cannot substitute for another. The post-spill consultation focuses on the effects of the spill response actions while NRDA is used for the effects of the spill itself.

Every spill and Incident Command System (ICS) is different. Service listed species experts would be involved in the Environmental Unit of the Planning Section and possibly also in the Operations Section. This should be planned before a spill and included in the ACP as well as practiced during exercises. The workgroup is continuing to develop more detailed training tools to assist you. More information will be provided through the internet, resident training courses, Regional Response Team meetings, and conferences. Workgroup representatives include:

LT Amy Baribeau, USCG Headquarters Office of Response

(202) 267-2877

Barbara Davis, EPA Oil Program Center

(703) 603-8823

CDR Emily Christman, NOAA National Ocean Service

(202) 267-1321

Mi Ae Kim, NMFS Endangered Species Division

(301) 713-1401 x159

Mike Horton, USFWS Endangered Species Division

(703) 358-2371

Everett Wilson, USFWS Environmental Contaminants Division

(703) 358-2148

Jan Thorman, DOI Office of Environmental Policy & Compliance

(202) 208-6304

Text Box: Why have

Post-Spill Consultation vs. NRDA?

Text Box: How can I get help?Text Box: How do Service representatives fit into ICS?